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IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

DEPARTMENT OF REVENUE,

Petitioner,

v.

SCRIPPS HOWARD CABLE COMPANY, ETC.,

Respondent.

Case No.: 87,381
District Court of Appeal
5th Distr. Case Nos.: 94-731
94-1301

ED HAVILL, ETC., ET AL.,

Petitioners,

v.

SCRIPPS HOWARD CABLE COMPANY, ETC.,

Respondent.

Case No.: 87,357
District Court of Appeal
5th Distr. Case Nos.: 94-731
94-1301

BRIEF OF AMICUS CURIAE JOHN W. MIKOS, PROPERTY APPRAISER OF SARASOTA COUNTY, FLORIDA, IN SUPPORT OF PETITIONERS

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PRELIMINARY STATEMENT

This court has postponed its decision on jurisdiction and ordered briefs on the merits after the Fifth District Court of Appeal certified a question of great public importance in Scripps Howard Cable Company, d/b/a Lake County Cablevision v. Ed Havill et al., 20 Fla.L.Weekly D2624, 5th DCA, December 1, 1995. Amicus Curiae, John W. Mikos, as Sarasota County Property Appraiser, was the Defendant in the case of Storer Cable TV of Florida, Inc., v. Mikos et al., consolidated case Nos. 93-03859 and 93-01346, in the Twelfth Judicial Circuit in and for Sarasota County, Florida, per curiam affirmed, in Mikos v. Storer Cable TV of Florida, Inc., 651 So.2d 1204 (Fla. 2d DCA 1995). Due to the similarity of issues, MIKOS has been permitted by order of this court to petition as amicus curiae on behalf of petitioners. Petitioner, ED HAVILL, (Defendant and Appellee below), will be referred to herein as "HAVILL". Respondents, SCRIPPS HOWARD CABLE COMPANY (Plaintiff and Appellant below) will be referred to "SCRIPPS HOWARD" or "SHCC". Petitioner, the FLORIDA DEPARTMENT OF REVENUE (Defendant and Appellee below), will be referred to as "DOR". JOHN W. MIKOS, as Sarasota County Property Appraiser, amicus curiae, will be referred to herein as "MIKOS".

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, JOHN W. MIKOS, as Property Appraiser of Sarasota County, Florida, hereby adopts the statement of the case and facts presented by HAVILL and the DOR.

SUMMARY OF THE ARGUMENT

The trial court issued a final judgment upholding the 1990, 1991 and 1992, assessments for SCRIPPS HOWARD's tangible personal property. The court found HAVILL considered each of the factors in Section 193.011, Florida Statutes. By reversing that final judgment, the appellate court has improperly substituted its judgment for that of the trial court's over whether HAVILL considered the factors in Section 193.011, Florida Statutes. The final judgment, record and trial transcript are replete with substantial competent evidence that HAVILL's employee considered each of these factors in his assessment.

The unit method of valuation has been in existence for more than 100 years. It has been judicially applied to various types of property including railroads, telephone, telegraph, express and utility companies. This method properly captures the entire bundle of rights for tangible personal property which has been assembled as an operating entity. The appellate court's exclusion of certain intangible influences on the value of this tangible personal property results in the fractionalization of SCRIPPS HOWARD's assessment.

These so-called intangibles which include franchises, tower leases, going concern, subscriber relations, work force in place and management, are properly included within the unit valuation of a cable television system. Neither HAVILL nor the DOR has separately assessed any of these items as intangible personal property. They are merely influences upon the value of SCRIPPS

HOWARD's tangible personal property which result in a fair market value above the sum of the parts.

The unit method of valuation has been approved in the State of Florida for use in both railroad and utility property. The unit method is not mandated by statute for use on either types of these properties. Neither an exclusive franchise nor regulated utility status justifies a differential treatment of this property over that of cable television property. Furthermore, the unit method has regularly been applied to all types of operating properties in Florida beyond just railroads and utilities.

ARGUMENT

I. THE APPELLATE COURT ERRED IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE TRIAL COURT ON WHETHER HAVILL CONSIDERED THE FACTORS IN SECTION 193.011, FLORIDA STATUTES

In the Final Judgment in favor of HAVILL, the trial court found that the director of HAVILL's tangible personal property division, Robert Ross, who performed the assessment on SCRIPPS HOWARD's tangible personal property, "considered all eight criteria in Section 193.011, F.S." (R2901). The trial court further found that Mr. Ross had considered the cost, market and income approaches to value, and had, therefore, complied with the requirements of Section 193.011, Florida Statutes. (R2901).

Contrary to these findings, the Fifth District Court of Appeal, in its opinion, found that "Ross admitted that he never inspected SCRIPPS HOWARD's equipment, that he was unaware of how much the tangible personal property cost and that he did not consider the income from that property or its condition". The appellate court contrasted these findings with Mr. Ross's "conclusory statements" that he, in fact, considered each of the eight statutory criteria when he considered the cost, market and income approaches to value. The appellate court found Mr. Ross's conclusory statements not credible, given his prior admissions that he had no idea of the condition, size, location or income produced by the tangible personal property.

In Greenwood v. Oats, 251 So.2d 665 (Fla. 1971), the Supreme Court was faced with a district court opinion reversing the factual findings of a trial court in an ad valorem case. As to the role of appellate courts, the Supreme Court stated:

> Moreover, because the considerations involved in these cases are primarily questions of fact, the role of the district court should in general be limited to a consideration of the sufficiency of the evidence. Clearly, it is not the function of an appellate court to substitute its judgment for that of the trier of fact, be it a jury or trial judge. Accordingly, although an appellate court might have reached a different conclusion had it been the initial arbitrator of the factual issues, if a review of the record reflects competent substantial evidence supporting the findings of the chancellor, the judgment should be affirmed.

Id. at 669.

The Supreme Court concluded that the district court had substituted its judgment for that of the chancellor. Since the judgment was supported by competent substantial evidence, the opinion of the district court was quashed.

The appellate court clearly erred in substituting its judgment for that of the trial court. The trial court's findings are clothed with a presumption of correctness. Markham v. Fogg, 458 So.2d 1122 (Fla. 1984). Markham involved the denial of an agricultural classification by the tax assessor. After applying the criteria set forth in the Florida Statutes, the trial court denied the relief sought and upheld the non-agricultural classification.

The district court reversed. It held that the evidence failed to support the trial court's findings that the land in question was not being used primarily for bona fide agricultural purposes. In reversing, the Florida Supreme Court found "since the evidence was

conflicting, we find that there was ample credible evidence adduced at the trial to sustain the trial judge's findings. The district court was hence in error in overruling the trial court on this point". Id. at 1126.

In the case sub judice, the trial judge determined that SCRIPPS HOWARD had not shown sufficient evidence to prove the property appraiser failed to consider the eight criteria in Section 193.011, Florida Statutes. As long as there is competent, substantial evidence to buttress this finding, an appeals court should not substitute its judgment for that of the trier of fact. Markham v. Fogg.

Beyond the findings contained in the final judgment, the record contains evidence that Mr. Ross considered the condition, size, location and income produced by the tangible personal property as required by Section 193.011, Florida Statutes. (TR885). In 1989 and 1990, SCRIPPS HOWARD willfully refused to provide cost information to HAVILL as required by Section 193.052(1)(a) and Section 195.027(4)(a), Florida Statutes. Among the information sought by these statutes is the original cost of the property, the age of the property, the condition and any depreciation or obsolescence. Taxpayers must be prepared to suffer the consequences of their refusal to provide such requested information. Palm Corporation v. Homer, 261 So.2d 822 (Fla. 1972). The Fifth District Court of Appeal, however, rewarded SCRIPPS HOWARD by determining that, despite the lack of available data, Mr. Ross failed to consider the cost of the property. The testimony is

unrebutted that, once Mr. Ross obtained cost data from SCRIPPS HOWARD, he performed the cost approach, late in 1990, as well as for the 1991 and 1992 assessments. (TR920).

The Fifth District Court of Appeal overlooked the principle that, where market evidence exists of either sales or income, the appraiser must perform a standard appraisal using normal techniques. Even had SCRIPPS HOWARD timely provided cost data, HAVILL could not have valued the property solely using the cost approach where sufficient data existed to use either the market or income approaches to value. The courts have held that, by performing a standard appraisal using either sales or income data, the property appraiser considers all and uses some of the factors set forth in Section 193.011, Florida Statutes. Bystrom v. Valencia Center, Inc., 432 So.2d 108 (Fla. 3rd DCA 1983). Having performed an income approach in this case, HAVILL considered all the factors in Section 193.011, Florida Statutes.

The record is also replete of evidence that Mr. Ross considered the condition of the property in performing the assessments for 1990, 1991 and 1992. Again, SCRIPPS HOWARD willfully failed to provide Mr. Ross with evidence that the property was in anything other than satisfactory condition. (TR886). Mr. Ross knew that the property was operating and providing services for the customers in Lake County, and was, thus, in good condition. (TR886). Further, Mr. Ross observed the aerial plant during his visits around the county. (TR886).

The court faults Mr. Ross for failing to inspect the property. However, there is no requirement in the law for a property appraiser to inspect tangible personal property. In fact, taxpayers report their personal property on a tax return along with other information which makes a personal inspection unnecessary. The Fifth District Court of Appeal fails to point out what a personal inspection would have accomplished. As testified to by Dr. Ifflander and Mr. Ross, there is no way to determine the condition of complicated electronic equipment by merely looking at it.

Mr. Ross considered the condition of the property in both his cost approach and his income approach. In applying the Department of Revenue present worth tables, Mr. Ross accounted for any depreciation to reflect the condition and age of the property. (TR994-TR995, TR1065). In the income approach by accounting for maintenance, Mr. Ross, likewise, considered the condition of the property.

The record and Final Judgment contain substantial competent evidence to support the Final Judgment in favor of HAVILL. The appellate court erred in substituting its judgment for that of the trial court as to whether Mr. Ross had considered some or all of the factors in Section 193.011, Florida Statutes. The decision of the Fifth District Court of Appeal could be reversed on this ground alone without considering the certified question.

II. THE UNIT METHOD OF VALUATION IS A LEGALLY RECOGNIZED TOOL FOR THE ASSESSMENT OF ALL TYPES OF PROPERTY INCLUDING TANGIBLE PERSONAL PROPERTY

The Fifth District Court of Appeal in this case has certified the following question as one of great public importance:

> Is the income/unit rule method of appraisal an appropriate method of assessing the tangible personal property of television cable companies?

It is respectfully submitted that there is no such thing as the income/unit rule method of appraisal. Instead, the Fifth District is confusing the concepts of the unit method of valuation (unit rule method, going concern valuation, etc.) and the various techniques for arriving at that valuation which include the income, market and cost approaches to value. In short, the Fifth District Court of Appeal has ruled in this case the unit method of valuation is inappropriate for the tangible personal property of a cable television company.

The concept of valuing tangible personal property as a unit was not developed by the property appraisers in the State of Florida for the purposes of singling out and assessing cable television property. In fact, the unit method of valuation was approved as long as 100 years ago by the United States Supreme Court as applied to railroads, telephone, telegraph and express companies. State Railroad Tax Cases, 92 U.S. 575, 23 L.Ed. 663 (1875); Cleveland C.C. and St. L.R. Co. v. Backus, 154 U.S. 439, 14 S. Ct. 1122 (1893); Western Union Telegraph Company v. Taggart, 163 U.S. 49, 41 L.Ed. 49 (1895); Adams Express Company v. Ohio State Auditor, 165 U.S. 194, 17 S. Ct. 305 (1896), Adams Express I; Adams

Express company v. Ohio State Auditor, 166 U.S. 185, 17 S. Ct. 604 (1897), Adams Express II.

Florida cases likewise have approved the unit method of valuation for railroad and utility company tangible personal property. Florida East Coast Railway Co. v. Department of Revenue, 620 So.2d 1051 (Fla. 1st DCA 1993); Florida East Coast Railway Company v. Green, 178 So.2d 355 (Fla. 1st DCA 1965); Simpson v. Loftin, 33 So.2d 230 (Fla. 1958); Bloxham v. Consumer's Electric Light & Street Railroad Co., 36 Fla. 519, 118 So. 444 (Fla. 1895); Lowe v. Lee County Electric Cooperative Inc., 367 So.2d 1114 (Fla. 2d DCA 1979).

This methodology was succinctly characterized in an opinion upholding the unit method by Justice Fuller of the United States Supreme Court in 1897 in Adams Express I:

> [N]o more reason is perceived for limiting the valuation of the property of express companies to horses, wagons, and furniture, than that of railroad, telegraph, and sleeping-car companies to roadbed, rails and ties, poles and wires, or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches, and furniture, the contracts for transportation facilities, the capital necessary to carry on the business -- whether represented in tangible or intangible property -- in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others....It is a unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case -- resulting from the very nature of the business. . . If by reason of the goodwill of the concern, or the skill, experience, and energy with which its business is conducted, the market value of the capital stock is largely increased, whereby the value of the tangible property of the corporation, considered as an entire plant, acquires a greater market value than it otherwise would have had, it cannot properly be said not to be its true value in money within the meaning of the Constitution, because goodwill

and other elements indirectly entered into its value. (Emphasis added)

Id. at 221, 222, 224.

When approving the unit method of valuation for railroads, the Florida Supreme Court in Simpson v. Loftin defined the concept as follows:

> [T]he gist of the unit system of taxation as so defined, requires that the value of the railroad system as a whole be first determined and such value is then apportioned or distributed on the basis outlined to the counties . . . Its purpose is to treat the physical properties, intangible properties and capital stock of the railroad as a unit for taxation . . .

Id. at 232.

Chapter 12D-2.001(a), Florida Administrative Code, further defines this method:

> Unit Rule Method of Valuation - an appraising method used to value an entire operating property considered as a whole with minimal consideration being given to the aggregation of the value of separate parts. The rights, franchises and property essential to the continued business and purpose of the entire property being treated as one thing having but one value in use.

A. The Unit Method of Valuation Is Required to Capture the Entire Bundle of Rights in Tangible Personal Property Assembled as an Operating Entity

The Fifth District Court of Appeal would seem to ignore that Florida is a State that, unless expressly exempted from taxation, taxes all real and personal property in this State. Section 196.001, Florida Statutes. Property is defined as the bundle of rights, flowing from the ownership of an object or a group of objects. In Spanish River Resort Corp. v. Walker, 497 So.2d 1299 (4th 1986), the court stated:

> The interval owner at Spanish River has all of the sticks 'which constitutes the bundle of rights' that is fee ownership of real estate: the complete right to use (or not to use) the property during the period of ownership; the right to exclude others during that period and the right to mortgage, lease, sell, bequeath or give away the time share estate.

Id. at 1302. See also Century Village v. Walker, 449 So.2d 378 (Fla. 4th DCA 1984).

In Western Union Telegraph Company v. Taggart, the taxpayer was the owner of a telegraph system comprised of telephone poles, lines, wires, cables, fixtures, instruments, machinery, appliances, and apparatus attached together into a for profit communication system.

The tax being challenged was an ad valorem tax by the State of Indiana based upon a market approach. The United States Supreme Court upheld the value using the unit method and quoted from a decision later cited by the Second District Court of Appeal in Lowe v. Lee County Electric Cooperative, Inc.:

> [T]he value of property results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determine the value; and if property is taxed at its actual cash value, it is taxed upon something which is created by the use to which it is put. Cleveland C.C.& St. L.R. Co. v. Backus, 154 U.S. at P. 446.

Taggart, at 22.

SCRIPPS HOWARD's individual amplifiers, converters, scramblers, cable, etc., have little value until integrated into an operating unit system. As stated in Western Union Telegraph Company v. Taggart:

> [I]t is not easy to see how one mile of appellant's telegraph line connecting Chicago with New York could be of less value than any other mile of the same line. Cut out one mile, even though it be through a swamp or under a lake, and the value of the whole line is practically destroyed. The property is a unit, valuable as a whole and by reason of its several connections, and not by virtue of any part taken by itself.

Id. at 25.

Florida law prohibits the fractionalized assessment of different interests in property. Department of Revenue v. Morganwoods Green Tree Inc., 341 So.2d 756 (Fla. 1976), holds that all interests in property be assessed together. Thus, to exclude certain "intangibles" or rights associated with the tangible personal property as determined by the Fifth District Court of Appeal violates both Florida statute and case law.

B. Intangible Influences on Value Are Properly Included in the Unit Method of Valuation of the Tangible Personal Property of a Cable Television Company

The Fifth District Court of Appeal has held in this case that the unit method of valuation is inappropriate for the tangible personal property of a cable television company. The basis of that holding is that HAVILL included certain exempt intangible personal property in his unit valuation of SCRIPPS HOWARD's tangible personal property. A careful review of the differences between tangible and intangible taxes reveals that these "intangibles" were merely influences from the value of SCRIPPS HOWARD's tangible personal property.

In Adams Express II, the terms intangible assets, intangible influences, or intangible property were used interchangeably. The

Supreme Court of the United States properly characterized the appropriate consideration of these terms for ad valorem tax purposes. The taxpayer argued as does SCRIPPS HOWARD that the value could not exceed the sum of the parts. The court responded:

> [W]henever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property must be excluded from the tax lists, and the only property place thereon the separate pieces of tangible property? (Emphasis added)

Id. at 218.

The supreme court acknowledged that the concept is dependent upon state law:

> [A] distinction must be noticed between the construction of a state law and the power of a state. If a statute, properly construed, contemplates only the taxation of horses and wagons, then those belonging to an express company can be taxed at no higher value than those belonging to a farmer. But if the state comprehends all property in its scheme of taxation, then the goodwill of an organized and established industry must be recognized as a thing of value. The capital stock of a corporation and the shares in a joint-stock company represent not only the tangible property, but also the intangible, including therein all corporate franchises and all contracts, privileges, and goodwill of the concern.[1]

Id. at 221.

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[1] The United States Supreme Court has continued to adhere to these principles. Norfolk & Western R. Co. v. Missouri Tax Com., 390 U.S. 317, 88 S.Ct. 995 (1968); Railway Express Agency v. Commonwealth of Virginia, 347 U.S. 359, 74 S.Ct. 558 (1954), (Railway Express I); Railway Express Agency v. Commonwealth of Virginia, 358 U.S. 434, 79 S.Ct. 411 (1959), (Railway Express II).

Florida law taxes both tangible personal property and intangible personal property. However, these properties are assessed and taxed separately. After filing of a tax return by the taxpayer, tangible personal property is assessed and taxed by the County within which the property is located. §§193.023 and 193.052, Fla. Stat. Intangible personal property also involves the filing of a tax return but is assessed and taxed separately by the State of Florida. §199.103, Fla. Stat. Both have their own separate sets of exemptions such as the intangibles exemption discussed by the Fifth District Court of Appeal for franchises under Section 199.185(1)(b), Florida Statutes.

The interplay between Florida's intangible personal property tax and other forms of property taxation was most recently discussed in Capital City Country Club Inc. v. Tucker, 613 So.2d 448 (Fla. 1993). In this case, the property appraiser attempted to assess the fair market value of certain land owned by the City of Tallahassee and leased to Capital City Country Club Inc. for use as a golf course. One of the grounds for objecting to the assessment of the land was that such constituted double taxation since the value of the Club's lease had been assessed by the State of Florida as intangible personal property. The Supreme Court upheld the assessment and taxation of the land as separate and distinct from the State's taxation of the Club's lease which constituted intangible personal property. The court stated that there was no unconstitutional double taxation where there are two taxpayers and two separate taxable transactions or privileges. Id. at 452.

In the case sub judice, there is no evidence that the DOR or, for that matter, HAVILL separately assessed SCRIPPS HOWARD's franchise as intangible personal property. Had the State or HAVILL done so, clearly Section 199.185(1)(b), Florida Statutes, would have exempted such property from taxation. Therefore, there can be no double taxation in this case and such has not been raised as an issue by SCRIPPS HOWARD.

On the other hand, it cannot be said that Florida law relating to tangible personal property requires franchises to be excluded from the valuation process. In Florida East Coast Railway Company v. Department of Revenue, 620 So.2d 1051 (Fla. 1st DCA 1993), the plaintiff made the double taxation argument on the basis that the State had included certain intangibles such as franchises, goodwill or other rights, in its unit (going concern) valuation. The court rejected this argument on the basis that there had been no evidence introduced at trial indicating the DEPARTMENT OF REVENUE had separately valued these exempt intangibles. In fact, the only evidence at trial on this matter was that the DEPARTMENT OF REVENUE and Plaintiff had included, within their going concern value, all real and personal property used in the operation of the railroad, viewed as an entity, with such franchises and agreements as were essential to its operation. Id. at 1055.

This is precisely how HAVILL handled the tangible personal property of SCRIPPS HOWARD. At trial, Mr. Ross admitted to having considered the franchises in his assessment of SCRIPPS HOWARD's personal property on the basis that it was part of the cost of the

tangible personal property, i.e., necessary to the cable system.[2] Mr. Ross's testimony was quite similar to that of the DEPARTMENT OF REVENUE's appraiser, Mr. Ziegler, in Florida East Coast Railway Company v. Department of Revenue, when he responded:

> Question: Did you value specifically its franchise and its location and its competitive position.
>
> Answer: We took into account, Mr. Daw, all of the factors which in our opinion would lead us to a fair value for the railroad. That included all aspects, some of them most of them tangible, some of them intangible.

Id. at 1055.

Florida courts have adopted the concept in ad valorem tax that the assessments shall include the entire bundle in rights in any property. Valencia Center Inc., Oyster Pointe Resort Condo v. Nolte,, 524 So.2d 415 (Fla. 1988), Spanish River Resort, Century Village, and Robbins v. Summit Apartments, 586 So.2d 1068 (Fla. 1991). It has rejected the concept of fractionalizing the values by different interests in property created by leases, contracts, covenants, restrictions or other intangible interests. SCRIPPS HOWARD's franchise, much like its goodwill, customer base and the skills of its management are merely intangible influences upon the value of its tangible personal property which has been assembled as

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[2] Ross did deduct the franchise fees recouped by SCRIPPS HOWARD from their customers in this income approach on the basis that any value attributable to this income stream belonged to the franchising authority. He did not deduct a franchise value from his unit value of the system.

a cable television system. They must be assessed as such under Florida law.

MIKOS does not take issue with HAVILL's reduction of 20% from the unit value of SCRIPPS HOWARD's tangible personal property for accounts receivable, cash, trade names, patents and copyrights. (TR881). HAVILL determined that these "intangibles" are legally recognized, capable of private ownership, marketable and possess value. (TR882). These items certainly meet the definition of intangible personal property under Section 199.023(1), Florida Statutes, and should have been excluded by HAVILL.

MIKOS does take exception to SCRIPPS HOWARD's incredible claim that its "intangibles" have a value of $42,314,444.00. (TR597). These "intangibles" included the franchises, tower leases, going concern and subscriber relations. (TR590). Their claim becomes even more unbelievable in light of SCRIPPS HOWARD'S failure to report any of this "intangible" property to the State as required by Chapter 199, Florida Statutes. (TR359-TR361). This so called value for intangibles, as determined by SCRIPPS HOWARD's expert, Fred Bills, was nothing more than an allocation of the remaining unit value not otherwise attributable to the cost less depreciation of the tangible personal property.

The absurdity of these claims is best highlighted by Fred Bliss's claim that the franchise had a value of $31,215,085.00. The parties agree the franchise held by SCRIPPS HOWARD was non-exclusive. In fact, under Federal law, anyone can apply for and receive a cable television franchise from a franchising authority.

Mr. Bliss testified that the cost of such a franchise would be $100,000.00 - $200,000.00. If cost equals value as claimed by SCRIPPS HOWARD then there must be some "intangibles" in Mr. Bliss's franchise value.

The principle of substitution states that when similar commodities, goods or services are available, the one with the lowest price will attract the greatest demand and widest distribution. One wonders why you would pay $31,000,000.00 for a franchise that can be purchased for a few hundred thousand dollars. Franchises are necessary for the operation of a cable television system. If it contributes value, this intangible must be included in the unit value of the system.

C. The Unit Method of Valuation Has Been Approved by the Courts of Florida for Use on any Property Which Has Been Assembled into an Operating System

The Fifth District Court of Appeal has determined that Florida case law that applies the unit method of valuation to railroads and utilities does not apply to the property of a cable television company. They distinguish cable television property on the basis that it does not hold exclusive franchises and is not regulated in the same manner as utilities. A careful review of Florida law reveals these distinctions do not justify differential treatment for cable television property.

The concept of the unit method or valuation of a going concern has been recognized in this State as early as 1895. Bloxham v. Consumer's Electric Light & Street Railroad Co. The Florida Supreme Court recognized the central assessment and application of

the unit method to a street railroad which was operated within the City of Tampa and wholly within the County of Hillsborough. The central assessment of this street railroad did not require allocation among counties. The Florida Supreme Court upheld use of the unit method over objection of the taxpayer that it should have been assessed locally.

In Schleman v. Guarantee Title Co., 15 So.2d 754 (Fla. 1943), the Florida Supreme Court reviewed the valuation for ad valorem tax purposes of an abstract plant, i.e., the assemblage of various individual filings from the public records establishing a title history of real property. The taxpayer argued that the intrinsic value of tangible personal property was as scrap paper. The taxpayer's contention was that the real value lay in that which the property represented, and was extrinsic and intangible, and thus, not taxable as tangible personal property. Id. at 760.

The court opined, however, that it would be hard to believe that the owner would be willing to sell his plant for its value as scrap paper, or that the perspective purchaser would expect to be able to buy it at that figure. The court held that the chief value of the books and records, i.e., the title plant was not extrinsic but intrinsic in the plant itself. The title plant's ability to earn income is just like any other plant or machinery producing a finished product from raw materials. The court then made the determination that the abstract plant's chief value, when assembled, was as tangible personal property and not intangible.

In Simpson v. Loftin, the Florida Supreme Court found the unit method was in general use throughout the country, and recognized by all courts of last resort, including the U.S. Supreme Court and the Florida Supreme Court, citing Bloxham.

The court recognized that the statute concerning the central assessment of railroads did not create the unit method nor did the Constitution specifically grant any such unit method, but the court stated:

> [T]hese decisions proceed on the general theory that there is nothing in the constitution prohibiting such a method of assessing railroad taxes and that it is the best means yet devised by which fairness and uniformity of assessments may be approached.

Simpson at 232.

The First District Court of Appeal in Florida East Coast Railway Company v. Green, upheld an appraisal under the unit approach which included a correlated value, giving equal weight to the three approaches. (Reproduction cost less depreciation, the market value determined by the stock and debt method, and the income approach.)

Finally, the latest pronouncement with reference to the unit method or going concern approach in the assessment of railroads was handed down by the First District Court of Appeal in 1993. Florida East Coast Railway Company v. Department of Revenue. The railroad argued that the utilization of a going concern value or the unit method, was unauthorized by statute and resulted in the wrongful assessment of intangibles. The DOR used an income as well as a market approach (stock and debt method) in their unit valuation.

In upholding the unit assessment of the railroad property as a going concern, the Supreme Court dispelled of the notion that use of a unit method or going concern valuation is required by statute. The court cites to the long history of the unit rule assessment of railroads both in Florida and in other states. The court found Florida East Coast Railway's own use of the unit rule method in valuing its property seriously undermined their position. The same could be argued of Mr. Bliss's use of the unit method and subsequent allocation of value to intangibles. It is further evident from this opinion that railroads like all other property in this State are required to be assessed based upon their just or market value. Powell v. Kelly, 223 So.2d 305 (Fla. 1969), and Walter v. Schuler, 176 So.2d 81 (Fla. 1965).

The Fifth District Court of Appeal's opinion in the case sub judice that railroad cases are inapplicable is based upon its assumption that the unit method of valuation is mandated for railroads in Section 193.085(4)(a), Florida Statutes. This Section does not mandate use of the unit rule method nor any particular technique for arriving at value (cost less depreciation, market and income). This notion was dispelled in Florida East Coast Railway v. Department of Revenue.

The Fifth District Court of Appeal does not elaborate as to what characteristics separate the railroad from a cable television system which would justify differential treatment for ad valorem purposes. It is not clear from the Court's opinion if it meant to hold that railroads had exclusive franchises or were considered

utilities under Florida law. Practically speaking, the tangible personal property of a railroad performs a similar purpose to that of the tangible personal property of a cable television system, i.e., transportation of a product from one point to another utilizing a connected system of operating property. Traditional methods for assessment of railroads would seem to have logical and rational application to a cable television system. The unit method of valuation being most often applied to railroads should, therefore, apply to a cable television system.

As for utilities, this court in 1979, reviewed the 1976 and 1977 assessment of Lee County electric cooperative property done by the Charlotte County property appraiser. He had relied upon the unit or going concern method. This court did not rely on any statutory authority when it recognized that the unit method was previously approved by the courts of the United States. This court cited United States Supreme Court decisions approving the use of the unit method. State Railroad Tax Cases; Backus. This court recognized that the unit method was an acceptable methodology within the discretion of the appraiser not to be overturned by the court. The opinion recognized that the unit approach contemplated an assessment utilizing a combination of the recognized methods of appraisal, (1) cost less depreciation, (2) capitalization of net income and (3) market value. The court adopted the often quoted provision from Backus.

> This is no denial of the mathematical proposition that the whole is equal to the sum of all its parts, because there is a value created by and resulting from the combined operation of all its parts as one continuous

> line. This is something which does not exist, and cannot exist, until the combination is formed.

Id. at 444. Lowe, at 1117.

The status of a property as a utility or not as a utility is a distinction without a difference. Electric company property is even more similar to that of a cable television company in that it transmits electricity or a signal from a headend through wires or cables to its customers. The Fifth District Court of Appeal, in its opinion, again, does not distinguish why lack of utility status makes application of the unit method inappropriate. The court's invalidation of the unit method as applied to cable television company cannot stand in light of this court's sanction of the unit method of valuation for use in railroad and utility property.

The concept of valuing a property as a unit or going concern, though the exact terminology may not have been utilized, has been applied in Florida to many other types of property including shopping centers, power companies, abstract plants, outdoor advertising signs, etc. Bystrom v. Whitman, 488 So.2d 520 (Fla. 1986)(approved the going concern value of a shopping center by the income approach); Bystrom v. Equitable Life Assurance Society, 416 So.2d 1133 (Fla. 3d DCA 1982), rev. den., (approved going concern value appraisal of a multi-purpose building by either income or cost approach); Lowe v. Lee County Electric Cooperative, Inc.; National Advertising Company v. State Department of Transportation, 611 So.2d 566 (Fla. 1st DCA 1992) (approved a unit method or a going concern valuation of a billboard sign whose income or potential value was more than twice the replacement cost of its

parts). These cases involve the valuation of operating properties, under the income approach, as going concerns. The net income was attributable to the rented space in each of these properties, and included such intangibles as location, management skills and leases.

CONCLUSION

The court has improperly substituted its factual findings for those of the trial court which were based upon substantial competent evidence. This court should further uphold use of the unit rule or going concern method for valuation of the tangible personal property of a cable television system. This court should further recognize the existence of intangible influences on the value of tangible personal property that should be included within its assessment. The decision of the Fifth District Court of Appeal should be quashed.

Respectfully submitted,

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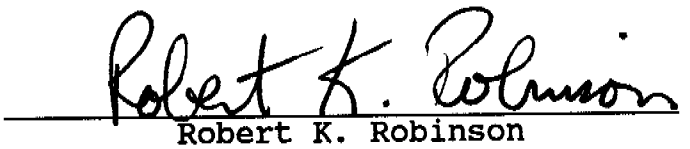

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